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NO. 90-1062

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAINBOW NAVIGATION, INC., and
INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS,

Petitioners,

v.

DEPARTMENT OF THE NAVY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT THE ICELAND STEAMSHIP COMPANY, LTD. IN OPPOSITION

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QUESTIONS PRESENTED

The United States and the Republic of Iceland entered into a treaty and related memorandum of understanding with the objective of replacing the U.S.-flag monopoly on the transportation of military cargo created by the Cargo Preference Act of 1904 with a regime in which both Icelandic and U.S.-flag carriers compete for shares of the cargo, and the economic viability of both countries' carriers is ensured. The questions presented are:

1. Whether unambiguous treaty provisions, interpreted by the court below according to their clear import and obvious meaning, can be contradicted by ambiguous ratification history never formally communicated to or accepted by the other signatory to the treaty.

2. Whether the determination by the Court of Appeals, based on evidence of record, that the initial manner of implementation of the treaty by the Executive Branch reflected merely one example of what the treaty allowed, and did not serve to establish how the treaty was required to be applied, constitutes an error requiring correction by this Court.

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STATEMENT OF THE CASE

The Iceland Steamship Company, Ltd.[1] ("Eimskip") hereby responds to the Petition for a Writ of Certiorari filed by Rainbow

[1] The Iceland Steamship Company, Ltd. is an Icelandic corporation engaged in ocean common carriage. Pursuant to Rule 29.1, the following is a list of the other companies in which this corporation holds a less than 100 percent stock interest: Aimenna bokafelagio hf.; Almennna Tollvorugeymsian hf.; Alpan hf.; Artek hf.; Buroaras hf.; D.N.G. hf.; Eignarhaldsfelag Lonaoarbanka Islands hf.; Eignarhaldsfelag Verslunarbanka Islands hf.; Eimskipafelag Islands hf.; Faxamarkaourinn hf.; Feroaskrifstofan Urval-Utsyn hf.; Fiskeldi Grindavikur hf.; Fiskimarkaourinn hf.; Fjarfestingarfelag Islands hf.; Flugleioir hf.; Frumkvaeol hf.; Hafnarbakki hf.; Hlutabrefasjoourinn hf.; Islensk Enduritrygging hf.; Islenska Utvarpsfelagio hf.; Marel hf.; Oliufelagio Skeljungur hf.; Oslax hf.; Polstaekni hf.; Saga Food Ingredients A/S; Sjova-Almennar tryggingar hf.; Skipaafgreiosla Jes Zimsen hf.; Slippstooin hf.; Skallagrimur hf.; Skjoldur hf.; Tollvorugeymsia Austurlands hf.; Tollvorugeymsian hf.; Taekniproun hf.; Prounanfelag Islands hf.

Navigation, Inc. ("Rainbow" or "the Petitioner") and the International Organization of Masters, Mates & Pilots ("IOMMP"). Eimskip was granted the status of intervenor in this proceeding by the District Court, based on its showing that as the incumbent Icelandic-flag carrier transporting U.S.-Iceland military cargo, it would be directly and substantially affected by the outcome of the litigation. Eimskip has actively participated throughout the proceedings before the District Court and the U.S. Court of Appeals for the District of Columbia Circuit.

Background

This litigation arises out of the interpretation and implementation by the U.S. Navy, Military Sealift Command ("MSC") of the Treaty of September 24, 1986 Between the United States of America and the Republic of Iceland to Facilitate Their Defense Relationship ("the Treaty") and an accompanying Memorandum of Understanding Between the United States of America and the Republic of Iceland in Implementation of the Treaty to Facilitate Their Defense Relationship ("the MOU"), both of which are set forth in Appendix B to the Petition. Pet. App. lb and 4b, respectively. The Treaty and MOU establish a unique regime governing transportation of military cargo moving between the U.S. and the NATO base at Keflavik, Iceland, which supersedes the provisions of the Cargo Preference Act of 1904, 10 U.S.C. § 2631 (1983) ("1904 Act") (reprinted at Pet. App. 6b).

The 1904 Act generally calls for U.S. military cargo to move on U.S.-flag vessels. For decades prior to 1984, however, all military cargo moving in the U.S.-Iceland trade was transported on Icelandic-flag vessels. The substantial volumes of cargo shipped by the military came to be relied on as a vital element in the economic viability of the Icelandic-flag shipping industry, which in turn constitutes a major factor in the economic well-being of the Republic of Iceland itself – a remote island nation with a population of only about 250,000, which has long been a strategically-important member of the NATO alliance.

In 1984, Rainbow was formed as a U.S.-flag carrier, operating a single vessel, with the avowed business strategy of invoking the 1904 Act to take away this military cargo from the Icelandic carriers which had previously been relied upon to transport it. The ensuing loss of

U.S. military cargo resulted in substantial adverse financial repercussions for the Icelandic-flag carriers, which was a matter of serious concern at the highest levels of the Icelandic Government, and thus threatened to disturb the positive relationship the U.S. had long enjoyed with this NATO partner.

To resolve the controversy, in 1986 the two governments entered into the Treaty and MOU, which supersede the 1904 Act in allowing Icelandic carriers to participate in the carriage of military cargo in this trade. The Treaty provides for the cargo to be divided between U.S. and Icelandic carriers on the basis of a competition such that both countries' carriers are able "to maintain a viable presence in the trade." Pet. App. 2b. The MOU goes on to provide for the low bidder in a single competition to receive 65 percent of the military cargo, and the lowest bidder of the other country to receive the remaining 35 percent, subject to the further proviso that if the "35 percent carrier" is unavailable during the term of the procurement to transport its full share, then the "65 percent carrier" may be allocated whatever cargo the "35 percent carrier" is unable to accommodate, in addition to its own 65 percent entitlement. Pet. App. 4b. Thus, the MOU contemplated a basic 65/35 percent division of the cargo, but recognized that the overall lowest bidder, which would be allocated the 65 percent share, could actually be given an even larger proportion of the cargo if the other carrier was "unavailable" to transport its full 35 percent share.

The Treaty explicitly provides for the competition to "result in contract awards that ensure that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade." Pet. App. 2b. Nevertheless, the motivation and objective of the two governments in entering into the Treaty was undisputably to restore an Icelandic-flag presence in the trade.[2] If the fundamental concern had been over the U.S.-flag carrier's economic

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[2] *See* President's Message to Congress Transmitting Treaty between the United States of America and the Republic of Iceland to Facilitate Their Defense Relationship with Related Memorandum of Understanding, signed at New York on September 24, 1986, S. Treaty Doc. No. 99-31, 99th Cong., 2d. Sess. (September 30, 1986). Joint Appendix to the Court of Appeals (hereinafter "J.A.") 46.

viability, the parties would have simply left alone the *status quo* under the 1904 Act, whereby Rainbow was accorded a *de facto* monopoly to carry as much of the military cargo as it could handle.

The Treaty Ratification Process

During the course of the Senate hearing on ratification of the Treaty, there was discussion of how the new Treaty regime would affect the incumbent U.S.-flag carrier in the trade, Rainbow Navigation. The State Department witness, Counsellor Edward J. Derwinski, specifically stated that "we did have in mind at all times the need to protect the interests of the current carrier" and that no U.S. interests would be injured in any way by ratification of the Treaty. *United States-Icelandic Treaty on the Carriage of Military Cargo: Hearing Before the United States Senate Committee on Foreign Relations*, 99th Cong., 2d Sess. 8, 11 (1986). J.A. 147, 150. On the other hand, in responding to a question as to what effect the Treaty would have on the "current American flag carrier," Counsellor Derwinski also said that "we could not provide, obviously, within the treaty for specific protection for an entity". *Id.* at 11. J.A. 150. Thus, what Counsellor Derwinski intended to convey to the Committee regarding whether Rainbow, as the current carrier, would be protected from injury as a result of ratification of the Treaty was, at best, ambiguous.

In its Report recommending ratification, the Senate Committee stated it was doing so:

> with the assurances of the Departments of State and Defense that . . . the treaty will be implemented in such a way that the existing United States-flag service in the Iceland trade would not be disadvantaged.

S. Rep. No. 27, 99th Cong., 2d Sess. 2, 3 (1986). J.A. 60. The Committee Report went on to state: "The Committee understands and expects that the economic viability of the United States-flag service will be maintained just as if the 1904 Act were fully in effect in the Iceland trade." *Id.* By referring to the existing U.S.-flag "service," the Committee Report is ambiguous as to whether it meant the incumbent carrier which was, as a practical matter, the only U.S.-flag "service" that had been operating in the Iceland trade, or carriage by U.S.-flag vessels in the generic sense. Pursuant to the Committee recommen-

dation, the Treaty was unanimously approved by the Senate on October 8, 1986, without attachment of any reservations or conditions qualifying the text of the Treaty. Nor is there any evidence that any communication was ever made to the other party to the Treaty, the Government of Iceland, of an intention to amplify the text of the Treaty itself by providing specific protection or subsidy for the incumbent U.S.-flag carrier.

Implementation of the Treaty and MOU

In 1987, MSC conducted the first procurement under the terms of the Treaty and MOU. In this competition, Eimskip was the lowest bidder of all, and thus was awarded the 65 percent share. Rainbow was the lowest (and only) bidder of the United States, and thus was awarded the 35 percent share. These contracts became effective May 1, 1987, and were to last for a one-year period.

In the Spring of 1988, as these contracts were nearing expiration, MSC initiated a new competition to award contracts for the following one-year period. The 1988 procurement differed from the earlier one in several technical respects. Among other things, it deleted these features that had been terms of the 1987 procurement: (l) that the U.S. part of the competition be conducted as a "small business set-aside"; (2) the requirement that bidders provide "under-deck stowage" (i.e., the facility to transport non-containerized break-bulk cargo below deck); (3) the requirement that vessels be equipped with onboard cranes; and (4) the possibility the U.S. carrier might be offered a "time charter" whereby it would be hired by the Navy on a full-time basis and used for other purposes when not carrying its share of the cargo between the U.S. and Iceland.

MSC explained that the restrictive specifications had been deleted from the 1988 procurement because it no longer envisioned entering into a time-charter of the U.S.-flag vessel to engage it for other purposes when not occupied in the U.S.-Iceland trade, and the restrictive specifications would only be relevant if such other uses were contemplated. J.A. 225. The 1988 procurement did not have a set-aside for small business because MSC's pre-procurement market survey indicated it was unlikely two or more qualified small busi-

nesses would bid on the contract[3] and under those circumstances the agency's regulations did not call for set-aside procedures.[4] J.A. 165, 170.

The 1988 procurement was enjoined by the District Court at the request of Rainbow and the IOMMP, which essentially contended the changes from the 1987 procurement terms were inconsistent with the representations made by Executive Branch officials to the Senate in connection with ratification of the Treaty, which Rainbow construed as protecting the economic viability of the particular class of U.S.-flag vessel with which Rainbow was serving the U.S.-Iceland trade at the time the Treaty entered into force. That order was reversed and vacated by a unanimous panel of the U.S. Court of Appeals, without remand, the court finding that the unambiguous language of the Treaty itself did not require the Government to ensure the economic viability of Rainbow or the class of vessel to which its ship belonged as distinguished from the U.S.-flag service as a whole. Pet. App. 1a. Rainbow's subsequent Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied by the Court of Appeals. Pet. App. 49a-50a. It did, however, grant Rainbow's request, supported by Eimskip, for a stay of the mandate pending submission to and action by this Court on a Petition for Writ of Certiorari. Pet. App. 51a.

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[3] In the 1987 procurement, which was conducted as a set-aside for small businesses, Rainbow was the only U.S. company which submitted a bid.

[4] The 1988 procurement initially called for separate competitions for the 65 percent and 35 percent shares of the cargo; in other words, a carrier with capacity to accommodate no more than the 35 percent share would have the option to bid only for that portion of the cargo without participating in the competition for the 65 percent share. In the course of the present litigation, MSC abandoned this element of its proposal and indicated it would conduct a unified competition with the overall low bidder receiving 65 percent of the cargo, and the lowest bidder of the other country receiving the remaining 35 percent, as provided in the MOU.

REASONS FOR DENYING THE WRIT OF CERTIORARI

A. The Court of Appeals Decision Rests On the Well-settled Principle of Law that a Treaty Should be Interpreted Based on its Plain Language

The Court of Appeals analysis and decision begins with the following recitation of black-letter law:

> Our analysis "must, of course, begin with the language of the Treaty itself." *Sumitomo Shoji America Inc. v. Avagliano*, 457 U.S. 176, 180 (1982).
>
> > The clear import of treaty language controls unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."
>
> *Id.* (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963)).

Rainbow Navigation Inc. v. Department of the Navy, 911 F.2d 797, 801 (D.C. Cir. 1990), Pet. App. 9a. Applying this analysis, the court below immediately went on to observe:

> By its terms, the Treaty and the MOU require only (l) that the Navy award contracts by means of a competition; (2) in a manner that "ensure[s] that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade"; and (3) that the lowest U.S. bidder receive at least 35 percent of the cargo.

Id. Indeed, Rainbow has not, and could not, argue that any language in the Treaty itself confers special protection for it, as the incumbent carrier at the time the Treaty was signed, or for the class of ship to which its vessel happens to belong. Rather, as the Court of Appeals pointed out, the text of the Treaty provides nothing more than for the Navy to hold a competition, resulting in awards to both U.S.-flag and Icelandic-flag carriers, with the U.S. carrier to receive at least 35 percent of the cargo.

It is undisputed that the Treaty was entered into at the instigation of the Icelandic Government based on its concern over its carriers being dispossessed of the military cargo they had carried for decades until Rainbow appeared on the scene and invoked the U.S.-flag monopoly provided by the 1904 Act. The purpose of the Treaty, without question, was to restore an Icelandic-flag presence in the carriage of U.S. military cargo – not to protect Rainbow.[5] Thus, it should hardly be surprising the plain language of the Treaty contains absolutely nothing to support Rainbow's claim of protected status. Under circumstances such as these, where the plain language of a treaty, consistent with the purpose of the contracting parties in entering into it, fails to provide for the claimed relief, there is no case law support whatsoever for going on to discern such relief from ambiguous ratification history. Indeed, none of the cases relied upon by Rainbow even calls for the examination of the ratification history of a treaty the text of which is unambiguous.[6]

In *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), the Court undertook to interpret a treaty provision based on examination of the literal language of the treaty itself, which yielded

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[5] *See, e.g.*, Letter of Transmittal accompanying the Treaty at the time it was sent to the Senate for ratification, in which President Reagan stated:

> The Government of Iceland has taken the position that because Iceland's economy and security depend upon its shipping lines, and because of our mutual defense interests, Icelandic lines should have the opportunity to compete for participation in this trade. Iceland's serious concern about this defense issue has been expressed at the highest levels. This Treaty will resolve this matter and will further the cooperation of the United States and Iceland in essential areas of defense.

President's Message to Congress Transmitting Treaty between the United States of America and the Republic of Iceland to Facilitate their Defense Relationship with Related Memorandum of Understanding, signed at New York on September 24, 1986, S. Treaty Doc. No. 99-31, 99th Cong., 2d. Sess. (Sept. 30, 1986). J.A. 47.

[6] As Justice Scalia noted in his concurring opinion in *United States v. Stuart*, 489 U.S. 353, 376 (1989), the District Court decisions in this litigation (subsequently reversed and vacated by the Court of Appeals) constituted "[t]he first (and, as far as I am aware, the only) federal decisions relying upon pre-ratification Senate materials for the interpretation of a treaty."

a result consistent with the stated intent of the parties to the treaty as expressed in submissions to the Court during the pendency of the litigation – approximately thirty years *after* the treaty was negotiated, ratified and entered into force. The *Sumitomo Shoji* decision did not even reference, much less rely on, the course of ratification proceedings before the Senate, or negotiating materials (in diplomatic parlance, known as *travaux preparatoires*). Rather than relying on Senate ratification materials, the Court stated: "Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji*, 457 U.S. at 184-85 (footnote omitted), quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). In applying this principle, the Court looked not to what went on in the colloquy between the Executive and the Senate at the time the treaty in question was submitted for the Senate's advice and consent, but to the position taken by the Executive Branch in connection with the then pending litigation, as evidenced by the brief submitted by the United States as *amicus curiae*. Here, as in *Sumitomo Shoji*, the position of the U.S. Government is quite clear, as manifested in its submissions to the District Court and Court of Appeals: The plain language of the Treaty contains no specific protection for Rainbow, and MSC should be free to structure its procurements in any manner that provides for a *competition*, in which awards are made to *both U.S. and Icelandic carriers*, and in which the U.S. carrier *receives at least 35 percent of the cargo*. Since the proposed procurement under challenge in this litigation concededly meets those requirements, the precedent of *Sumitomo Shoji* requires MSC to go no farther.

Likewise, *Maximov v. United States*, 373 U.S. 49 (1963), fails to provide support for the premise of Rainbow's argument that ratification history can be given authoritative weight in interpreting a treaty. There, the Court first found: "The plain language of the Convention does not afford any support to the petitioner's argument. . . ." *Id.* at 52. The Court went on to state:

> Moreover, it is *particularly* inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a

> result inconsistent with the intent or expectations of its signatories.

Id. at 54 (emphasis added). As Justice Scalia discussed in his concurring opinion in *United States v. Stuart*, 489 U.S. 353, 372 (1989), the import of this statement was not that it would be appropriate under some circumstances to deviate from the plain language of a treaty, but rather that such an approach would be *particularly* inappropriate if this would effect a result inconsistent with the expectations of the signatories.

Here, as in *Maximov*, there has been no showing the signatories – *i.e.*, the Icelandic and U.S. Governments – intended by their Treaty to provide special protection for the incumbent U.S. carrier, or indeed any specific carrier or class of vessels. If anything, they intended to take away the monopoly on this cargo which Rainbow had enjoyed under the 1904 Act and re-introduce Icelandic-flag competition into the trade. Accordingly, as the Court said in *Maximov*, it would be "particularly inappropriate" to deviate from the clear import of the language of the Treaty itself.[7]

In *O'Connor v. United States*, 479 U.S. 27 (1986), likewise, no reliance was placed on ratification history in the interpretation of a treaty. The meaning of the provision at issue in that case was initially determined based on an examination by the Court of the entire text of the Treaty itself – not its ratification history. After deciding what the plain language of the treaty meant without recourse to extrinsic sources, the Court went on to state:

> While the Claims Court may have been correct that the negotiating history does not favor the Government's position sufficiently to overcome what that court regarded as a plain textual meaning in favor of the taxpayers, it certainly

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[7] *In Maximov*, the Court cited in a footnote, but did not discuss or rely on in any way, the Letter of Transmittal from the President to the Senate, as well as the Report of the Secretary of State (see 373 U.S. at 54 n.2). Significantly, the Court did not even mention any colloquy conducted during the Senate hearing, Report language put forward by the Senate Foreign Relations Committee, or Senate floor debates.

> does not favor the taxpayers' position sufficiently to affect our view of the text.

Id. at 35. Thus, the interpretation of the treaty provision at issue in *O'Connor* was determined through examination of the plain language of the treaty text itself, the Court specifically finding the negotiating history did not favor either side in the dispute.[8]

Thus, the sum and substance of the case law relied upon by Rainbow stands for nothing more than the longstanding black letter law precept that treaties are to be interpreted according to the clear import and obvious meaning of the language set forth in the treaty document itself. In *Sumitomo Shoji*, the two governments which were parties to the treaty merely confirmed to the Court their concurrence with the "plain meaning" construction the Court itself developed. In *Maximov*, the Court stated it would be *particularly* inappropriate to consider extraneous materials when, as here, the obvious meaning of the words of the treaty has not been shown to be inconsistent with the objectives of the two governments in entering into the treaty. And in *O'Connor*, the Court determined the meaning of the treaty provision at issue without resort to extrinsic materials, and went on to observe that the negotiating history did not particularly favor either side in the litigation. In brief, Rainbow's theory that the Court should amplify the language of the U.S.-Iceland Treaty by resort to ratification history (which here is, at best, ambiguous) is devoid of precedential support

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[8] It is also significant that the Court looked only to the *negotiating* history of the treaty, not the ratification history. It considered earlier drafts of the treaty exchanged between the two governments, but did not refer to the Senate hearings, the Senate Foreign Relations Committee Report, or Senate floor debate. *See also Air France v. Saks*, 470 U.S. 392 (1985), in which the Court construed an ambiguous term of a treaty first by reference to the treaty text itself, *Id.* at 396-97, and went on to consider *negotiating* history (prior drafts exchanged among the signatories and the stated reasons for revisions to the drafts) but not the domestic ratification history. *Id. at 400-04.*

and totally inconsistent with extensive and longstanding jurisprudence on this question.

B. The Discussion Put Forward in *United States v. Stuart* Similarly Provides No Support for the Method of Treaty Interpretation Urged By Rainbow

Petitioner makes much of the Court's decision in *United States v. Stuart*, 489 U.S. 353 (1989), the opinions in which expressed somewhat differing views as to whether ratification history should be consulted in interpreting a treaty. In *Stuart*, all nine Justices concurred in the judgment that the treaty at issue, construed according to the plain meaning of the language set forth in the treaty document itself, did not support the relief claimed. The opinion of the Court, written by Justice Brennan, acknowledging the principle developed in *Maximov* and *Sumitomo Shoji* that "the clear import of treaty language controls," held that the relevant treaty provisions "on their face therefore lend no support to respondents' position." *Id.* at 366. The Court went on to state:

> The Senate Committee on Foreign Relations did not hold hearings on the Convention prior to its ratification in 1942, and the Committee Report did not even mention the provisions for exchange of information.... The President's message accompanying transmittal of the proposed treaty to the Senate [citation omitted] and the President's proclamation at the time the Convention was signed [citation omitted] similarly contain no language supporting respondents' argument. In any event, nothing in the history of the Convention's ratification buttresses respondents' claim.

Id. at 366-68 (footnote omitted). Thus, the *Stuart* decision rested not on use of ratification history to amplify ambiguous treaty provisions, but on a plain meaning construction of the treaty itself, with the observation added that the ratification history was silent on the point at issue. While the Court went on, in footnote 7 (489 U.S. at 367), to explain why reliance on pre-ratification Senate debates and reports could be proper, the fact is the holding in *Stuart* was in no way based on the content of such materials. As the above quotation makes clear,

it was quite evident to the Court the ratification history was silent on the treaty provision there at issue, and thus the question of utilization of pre-ratification materials to construe the treaty was not ripe for decision in that case.

Justice Kennedy, joined by Justice O'Connor, concurring in the judgment, emphasized that since the text of the treaty itself was not ambiguous, it was unnecessary to consider the import of the ratification history:

> It is quite unnecessary for the resolution of this case to explore or discuss the Senate proceedings that led to ratification of the 1942 Convention Respecting Double Taxation; for, as the court unanimously agrees, the text of the Treaty is quite sufficient to decide the issue before us.

Id. at 370.

The concurring opinion by Justice Scalia emphasized the point of law that extra-textual sources are to be given authoritative effect only if the treaty provision in question is ambiguous, and went on to express the view that even in such a case, the only materials which should be consulted are those which reflect the mutual agreement of the two sovereigns – *i.e.*, the negotiating history as distinguished from the ratification history. *Id.* at 373-74. Quoting from *New York Indians v. United States*, 170 U.S. 1, 23 (1898), Justice Scalia reasoned that whatever exchange may take place between the Executive Branch and the Senate in the domestic process of treaty ratification cannot be binding on the other signatory to the treaty, which was not a party to those discussions.[9]

[9] Justice Scalia went on to observe that the Senate indeed retains the "power to enforce its own understanding of treaties" through attaching conditions to its resolution of consent to ratification. No such action was taken with respect to the U.S.-Iceland Treaty. 489 U.S. at 374.

Justice Scalia further noted that Congress always has the power to abrogate a treaty by enacting inconsistent subsequent legislation. *Id.* at 375. To do so in the present case would presumably have serious foreign policy consequences considering the history and motivation for entering into the Treaty in the first place. As a matter of law, however, if Congress is truly dissatisfied with the interpretation given this Treaty by the Executive Branch or the courts, it may exercise the ultimate option of abrogating the Treaty as a matter of U.S. domestic law by enacting inconsistent legislation.

In this connection, the D.C. Circuit had occasion to consider the legal effect of understandings reached between the Senate and Executive Branch officials in the course of the treaty ratification process in *Power Authority of New York v. Federal Power Commission*, 247 F.2d 538 (D.C. Cir. 1957), *vacated and remanded with directions to dismiss as moot sub nom American Pub. Power Ass'n v. Power Authority of New York*, 355 U.S. 64 (1957). While that decision does not serve as binding precedent because of the subsequent dismissal for mootness, it provides a persuasive discussion of the reasons why a Senatorial condition of purely domestic effect should not be regarded as an enforceable qualification on the language of the treaty itself. The court explained:

> The reservation made no change in the treaty. It was merely an expression of domestic policy which the Senate attached to its consent. It was not a counteroffer requiring Canadian acceptance before the treaty could become effective.

Id. at 541. While the court viewed the reservation as an expression of domestic policy on the part of the Senate, it held the statement was still not enforceable because the Constitution requires the concurrence of the House of Representatives in order to make domestic law.[10] *Id.* at 540.

The views of the Senate Foreign Relations Committee, and those of Senator Pell expressed on the Senate floor, regarding the future of Rainbow once the U.S.-Iceland Treaty was ratified, similarly concerned a matter of purely domestic effect which did not require concurrence of the Government of Iceland before the Treaty could become effective. Therefore, they should not be regarded as an enforceable amplification of the Treaty, as would a formal reservation on a matter of non-domestic concern which required the assent of the other sovereign. Furthermore, since the statements regarding future treatment of Rainbow were never presented to nor endorsed by the

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[10] That case considered a formal *reservation* attached by the Senate as a condition of its consent to ratification, which pertained to a solely domestic matter. In consenting to ratification of the U.S.-Iceland Treaty, the Senate did not adopt any such reservation or otherwise attempt to formalize the remarks contained in the Committee Report forwarding the Treaty to the full Senate, or any views expressed in the floor debate.

House of Representatives, they cannot otherwise be transformed into an element of enforceable U.S. domestic law. Under the reasoning expressed by the D.C. Circuit in *Power Authority of New York*, the ratification history of this Treaty should not be accorded authoritative weight.

The facts of this litigation, like those of the *Stuart* case, do not present for decision the question of whether it would be appropriate to consult ratification history if the provisions of the Treaty were ambiguous. As the D.C. Circuit has held, the provisions of this Treaty are quite unambiguous, imposing on the U.S. Government three specific and clear obligations none of which encompasses the relief claimed by the Petitioner. 911 F.2d at 801. Pet. App. 9a. The U.S.-Iceland Treaty calls for "contract awards that ensure that both United States flag carriers and Icelandic shipping companies are able to maintain a viable presence in the trade." Pet. App. 2b. It says nothing about special treatment for incumbent carriers or the class of vessels those carriers happen to use. As the Court held in *Stuart*, the pertinent provisions of the Treaty "on their face therefore lend no support to [Petitioner's] position." 489 U.S. at 366. The Court should not grant the instant petition for certiorari because this case presents nothing more than an opportunity to reaffirm what was already established in *Stuart* and a long line of prior precedent: When the plain language of a treaty is unambiguous, it is unnecessary and inappropriate to give authoritative weight to *any* extrinsic materials. It would be particularly unnecessary and inappropriate to do so in this case, where the text of the Treaty is clear while the ratification history contains considerable ambiguity. [11]

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[11] As expressed by the Court of Appeals: "Ambiguous ratification history cannot be allowed to obscure the meaning of clear Treaty language." 911 F.2d at 802. Pet. App. 11a. *See also Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989): "[W]here the text is clear, as it is here, we have no power to insert an amendment." (footnote omitted).

C. Rainbow is in Error in Attaching Authoritative Weight to the Manner in Which the Treaty was Initially Implemented by the Executive Branch

MSC's first procurement following entry into force of the Treaty contained a "time charter" option, required various vessel specifications, and was conducted as a small business set-aside (see *supra p.5), all of which were amenable to the interests of the Petitioner. The Court of Appeals rejected Rainbow's contention that this initial procurement served as evidence of what the Executive Branch believed the Treaty to require*, finding it to reflect, rather, nothing more than one version of what the Treaty would *permit*.[12] 911 F.2d at 802. Pet. App. 11a. The Court of Appeals found the terms of the procurement MSC attempted to conduct in 1988, which became the subject of this litigation, to be equally within the clear and unambiguous requirements of the Treaty. Rainbow is without support for its assertion that this analysis, supported by evidence of record, was incorrect and should be reversed.

The change in content between the 1987 and 1988 procurements was the result of reasoned decision-making by MSC, documented in its submissions to the District Court in connection with this litigation (see *supra* n.12). The Court of Appeals has reached its judgment that the MSC's action was valid and within the bounds of what the Treaty would allow. Such a fact-dependent determination, which even Rainbow admits is supported by evidence of record (see Pet. at 18), does not call for reexamination by the Supreme Court.

Even assuming, *arguendo*, the initial procurement reflected what MSC thought the Treaty required at that time, it is not estopped from changing that interpretation in the future. In the *Stuart* case, upon which Rainbow primarily relies in this connection, there was no change in the manner the treaty in question was interpreted by the Executive Branch since the time it entered into force. Thus, *Stuart*

[12] In this connection, the Government had submitted evidence to the District Court explaining the restrictive specifications in the initial procurement were included because MSC anticipated it would be able to productively use Rainbow's vessel in other trades when not engaged in carrying its allocated share of the U.S.-Iceland cargo. After one year of experience with this arrangement, MSC reconsidered and determined engagement of the vessel in such other trades was not appropriate to its then-current needs. J.A. 225.

neither presented nor answered the question, raised by Petitioner in this case, of whether a change in the Executive's manner of implementation of a treaty would prevail over its initial interpretation.[13]

That question was resolved, however, in *Sumitomo Shoji, supra*, which indeed was quoted in *Stuart* on this point (489 U.S. at 366). In *Sumitomo Shoji*, the Court had occasion to consider the varying interpretations of a treaty by the Executive Branch over time, and ruled that the most recent interpretation, which was found to be consistent with the Court's determination of the plain language of the treaty, was "entitled to great weight" notwithstanding that it was inconsistent with the prior State Department interpretation:

> The Court of Appeals and Sumitomo dismiss the Atwood letter as incorrect, and point to a letter written by a previous State Department Deputy Legal Advisor as taking the contrary view. [Citation omitted.] However, neither of these letters is indicative of the state of mind of the Treaty negotiators; they are merely evidence of the later interpretation of the State Department as the agency of the United States charged with interpreting and enforcing the Treaty. However ambiguous the State Department position may have been previously, it is certainly beyond dispute that *the Department now interprets the Treaty in conformity with its plain language*, and is of the opinion that Sumitomo is not a company of Japan and is not covered by Article VIII(1). That interpretation, and the identical position of the Government of Japan, is entitled to great weight. *Kolovrat v. Oregon*, 366 U.S. 187 (1961).

457 U.S. at 184 (emphasis added). Thus, rather than crediting Rainbow's argument that once the Executive Branch interprets a treaty in a particular way it is estopped from later changing its mind, the Court, in *Sumitomo Shoji*, accorded "great weight" to the most recent

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[13] Similarly, *O'Connor v. United States, supra*, presented a case of *consistent* Executive Branch interpretation and implementation of a treaty from the time of initial entry into force. There the Court merely noted the Executive Branch had consistently implemented the treaty in accordance with what the Court had determined to be the plain meaning of the treaty provisions at issue (479 U.S. at 33).

interpretation of the Executive notwithstanding that it supplanted the prior State Department interpretation.[14]

The U.S.-Iceland Treaty and MOU framework hardly contemplated that specific procurement provisions which MSC found appropriate to its needs for one particular year would be enshrined as the guidelines under which the competition would forever have to be conducted. If that had been the objective, surely the negotiators would have crafted such requirements into the MOU itself. Instead, the Treaty and MOU clearly envisioned MSC would be left to fashion the specifics of the "periodic competitions" in accordance with the changing exigencies of its traffic and other defense and commercial considerations. In revising the terms of the procurement from 1987 to 1988, MSC did nothing more than that. Moreover, in accordance with *Sumitomo Shoji*, what is dispositive is the *current* practice of the Executive in interpreting the Treaty, not the way it interpreted the Treaty in the past. Obviously, MSC currently interprets the Treaty as permitting its revised 1988 procurement, and the Court of Appeals was correct in upholding that determination.

CONCLUSION

The questions stated by Rainbow in its Petition for Certiorari, while suggesting interesting legal issues, are not in fact presented by this case. The D.C. Circuit correctly decided this case based on well-settled law that unambiguous treaty provisions should be construed according to the obvious import of the treaty language itself, and should not be supplanted by ambiguous ratification history. Since the textual provisions here at issue are not ambiguous, the extent to which reference is appropriate to extrinsic source materials in the course of interpreting an ambiguous treaty provision is not at issue. Whether ratification history, as distinguished from negotiating history, should be consulted in such an exercise is similarly not presented.

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[14] Furthermore, in *Sumitomo Shoji*, the current position of the Executive Branch was expressed in the form of a Brief to the Court submitted by the Solicitor General as *amicus curiae*. To the extent Rainbow would attach diminished weight to MSC's explanation of why it changed the terms of the procurement from 1987 to 1988

As to whether the current practice of the Executive Branch in implementing a treaty supersedes the prior inconsistent practice of the Executive Branch, the Court has already definitively answered that question in a manner adverse to the Petitioner's contentions.

In sum, the decision of the Court of Appeals does nothing more than restate and correctly apply a series of well-settled legal principles. It fails to raise any conflict with the decisions of the other Circuits or of this Court. For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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